Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1979

No. 79-1620

REGINA COOPER, JULIA GLENN, CAROL ANN LEWIN, DORIS McNAIR, ELAINE REED and TRACY WRIGHT, for themselves, and on behalf of all others similarly situated,

Plaintiffs-Respondents,

against

WILLIAM LOMBARD, Individually and in his official capacity as Sheriff of the County of Monroe,

Defendant-Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents submit this brief in opposition to petitioner's request that a Writ of Certiorari issue to review the opinion and judgment of the New York Court of Appeals entered in the Monroe County Clerk's office on January 4, 1980 and the Order dated February 14, 1980 of the New York Court of Appeals denying petitioner's motion for leave to reargue.

Opinions Below

On December 19, 1979 the New York State Court of Appeals affirmed, as modified, a decision of the Appellate Division, Fourth Department, New York Supreme Court. The Opinion of the New York State Court of Appeals is reported at: 49 N.Y. 2d 69 (1979). The Opinion is annexed to the Petition as Exhibit "C".

On February 14, 1980, the New York State Court of Appeals denied Petitioner's motion for leave to reargue ____ N.Y. 2d ____, (1980). A copy of the Order was forwarded to the Supreme Court on April 18, 1980 by Petitioner.

The Appellate Division, Fourth Department, New York Supreme Court affirmed, as modified, the opinion of the New York Supreme Court. The Appellate Division opinion is reported at: 64 A.D. 2d 130, (1978), and is annexed to the Petition as Exhibit "B".

The opinion of the New York Supreme Court, Trial Term is reported at: 91 Misc. 2d 302, 398 N.Y.S. 2d 36 (1977) and is annexed to the Petition as Exhibit "A".

Questions Presented

1. Whether the New York Court of Appeals was free to grant pretrial detainees broader due process protections under the State Constitution than afforded by the United States Constitution per this Court's decision in *Bell v. Wolfish.*
2. Whether there exists independent and adequate state grounds for the decision of the New York Court of Appeals sufficient to insulate the decision from review by this Court.
3. Whether petitioner's due process rights were violated by the New York Court of Appeals decision insofar as it is alleged the Court made a finding of fact not made by the Trial Court.

REASONS FOR DENYING THE WRIT

I

A State Court may interpret its State Constitution in a manner granting greater rights than afforded by the United States Constitution.

The Supreme Court has "... nothing to do with the interpretation of the Constitution of the state . . .; those questions are for consideration of the courts of the state and their decision of them is final." *Hunter v. City of Pittsburgh,* 207 U.S. 161, 176, 28 S. Ct. 40, 45 (1907). This Court has consistently recognized that state courts may provide greater protections to their citizens "as a matter of their own law," than those afforded by the United States Constitution. *Oregon v. Hass,* 420 U.S. 714, 719, 95 S. Ct. 1215, 1219 (1975) (and cases cited therein.)

Here the New York Court of Appeals specifically held that:

> "We hold that pretrial detainees are entitled to contact visitation as a matter of state though not of federal, constitutional right."

49 N.Y. 2d at 73.

The Court further stated:

> "We have not hesitated when we concluded that the Federal Constitution as interpreted by the Supreme Court fell short of adequate protection for our citizens to rely upon the principle that that document defines the minimum level of individual rights and leaves the States free to provide greater rights for its citizens through its Constitution, statutes or rule-making authority" (citations omitted).

49 N.Y. 2d at 79. See also, *Sharrock v. Dell Buick,* 45 N.Y. 2d 152, 159-161 (1978) (discussing the distinct evolutions and purposes of the State and Federal due process clauses).

Thus the clear statement by the New York Court of Appeals to grant pretrial detainees contact visitation pursuant to analysis based on the State Constitution obviates any conflict with *Bell v. Wolfish*, 99 S. Ct. 1861 (1979), which decision was based solely on the Federal Constitution.

II

There are independent and adequate state grounds for the decision of the New York Court of Appeals sufficient to insulate the decision from review by this Court.

The New York Court of Appeals did not impose greater restrictions as a matter of federal constitutional law where the Supreme Court "[s]pecifically refrained from imposing them" (*Oregon v. Hass, supra*, 420 U.S. at 179, 95 S. Ct. at 1219) nor did it "... avoid deciding federal questions and thus defeat the jurisdiction of this Court by putting forward nonfederal grounds of decision which are without any fair or substantial support (citations omitted)", (*Wolfe v. State of North Carolina*, 364 U.S. 177, 185, 80 S. Ct. 1482, 1487 (1960).)

In fact, the New York Court of Appeals thoroughly considered the Federal due process rights claimed by pretrial detainees and accepted petitioner's contention that application of the analysis set forth in *Bell v. Wolfish, supra* would not mandate contact visitation in pretrial detention. 49 N.Y.2d at 76-78. Therefore, neither did the Court of Appeals "impose any greater restriction" than that arguably permitted by *Bell*, nor did it "avoid deciding the federal question."[1]

[1]Even if, as respondent believes, the Federal issue was wrongly decided, the existence of an independent and sufficient state ground to support the decision precludes review by this Court. *Fox Film Corporation v. Miller*, 296 U. S. 207, 209-210, 56 S. Ct. 183, 184 (1935). *See*, "Supreme Court Practice, 5th Ed." Stern and Gressman, ¶ 3.31. This Court specifically expressed no opinion on whether contact visits are federally constitutionally required. *Bell, supra.*, p. 1885 fn. 40.

Since the New York Court of Appeals was free to interpret its own Constitution, see "Discussion", *supra.*, p. 3, its adoption of a more rigorous regimen for scrutinizing conditions of pretrial detention under the State Constitution than that set forth in *Bell*, created an independent and substantial state law ground for the decision. Cf., 49 N.Y. 2d at 78-82[2], *Fox Film Company v. Muller, supra.*, "Supreme Court Practice", *supra.*

III

The Court of Appeals did not make any findings of fact in violation of petitioner's due process rights.

Petitioner's contention that the New York Court of Appeals made a finding of fact regarding the beneficial aspects of contact visitation, in the first instance, without an opportunity for petitioner to cross-examine witnesses, or present evidence, is a misrepresentation of the proceedings below.

The trial court, after taking testimony from and on behalf of all parties, including petitioner, from April 14, 1976 (91 Misc. 2d at 305) to April 30, (91 Misc. 2d at 307), stated:

> "There was before this court (as there was, apparently, in Rhem) a wealth of evidence to show that contact visiting would be beneficial to the mental health and physical well-being of the inmates and would lessen tensions and the potential for disruption in the jail."

91 Misc. 2d at 331. Petitioner's claim that he never was afforded an opportunity to present evidence on the issue of contact

[2]The adoption of this more rigorous regimen by the Court did not require reliance on any federal compulsion as suggested in the Petition, p. 7-8 but was based solely on the State Constitution. Where the Decision in *Bell* prohibited only practices which could be construed as punishment of pretrial detainees, the New York Court of Appeals adopted a balancing test which weighs the harm to the individual against the benefit to the state. 49 N. Y. 2d at 80. Only *after* this test was adopted and applied did the existence of a fundamental right of marriage and family life become relevant to weighing the harm to the individual. 49 N. Y. 2d 80-81.

visitation is nothing more than a smokescreen to secure this Court's salvation from his own ill-considered tactical decision to forgo presentation of any evidence that contact visitation might be detrimental.

The New York Court of Appeals, in agreeing that contact visitation was beneficial, did nothing more than adopt the foregoing statement of the trial court and take judicial notice of legal precedent and recognized expert opinion on this subject. 49 N.Y. 2d at 80-81. The Court additionally found, in the record that:

> "... the prison officials in Monroe County ... candidly admitted that contact visitation would be beneficial and a more human method of detention ..."

49 N.Y. 2d at 80.

Petitioner's claims of denial of due process are without authority or merit.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that exercise of the Court's discretionary power of review is inappropriate. The New York State Court of Appeals in interpreting its State Constitution has set forth independent and adequate state grounds to support its decision. Accordingly, the Petition for Writ of Certiorari should be denied.

DATED: Rochester, NewYork
May 2, 1980

Respectfully submitted

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